

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NAJAY CUMMINGS,

Plaintiff,

-v.-

JAMES CASSAR and CHELSEA
WHITTAKER,

Defendants.

23 Civ. 11184 (KPF)

ORDER

KATHERINE POLK FAILLA, District Judge:

This Order resolves certain issues discussed during the pre-motion conference held in this matter on January 17, 2025. First, as suggested by the Court's comments during the conference, the Court will deem Plaintiff's Amended Complaint (Dkt. #25), which is the operative pleading in this matter, to have been amended to include those factual assertions (as distinguished from legal arguments) made by Plaintiff during the conference. *See Yates v. Villalobos*, No. 15 Civ. 8068 (KPF), 2018 WL 718414, at *1 n.2 (S.D.N.Y. Feb. 5, 2018) ("Courts may also consider statements made in response to a defendant's request for a pre-motion conference and statements made during that conference." (collecting cases)); *accord Polardo v. Adelberg*, No. 22 Civ. 2533 (KMK), 2023 WL 2664612, at *1 n.2 (S.D.N.Y. Mar. 28, 2023) (collecting cases), *appeal dismissed sub nom. Poplardo v. Adelberg*, No. 23-604, 2023 WL 4504459 (2d Cir. June 8, 2023); *cf. Walker v. Schult*, 717 F.3d 119, 122 n.1 (2d Cir. 2013) ("A district court deciding a motion to dismiss may consider factual allegations made by a *pro se* party in his papers opposing the motion.").

Defendants may therefore consider it prudent to obtain a transcript of the conference in connection with briefing their motion to dismiss. If they choose to do so, the Court directs them to mail a copy of that transcript to Plaintiff at his address of record. The Court also cautions Defendants to be mindful of the Second Circuit's directives regarding material that a court may properly consider in the context of a Rule 12(b)(6) motion. *See, e.g., United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 106 (2d Cir. 2021); *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016); *see also Donoghue v. Gad*, No. 21 Civ. 7182 (KPF), 2022 WL 3156181, at *3 (S.D.N.Y. Aug. 8, 2022) (discussing what makes a document "integral" to a complaint).

Also during the conference, the Court scheduled Defendants' motion to dismiss as follows: Defendants' opening submissions are due on or before **March 7, 2025**; Plaintiff's submission in opposition is due on or before **April 18, 2025**; and Defendants' reply submission is due on or before **May 9, 2025**. Defendants are reminded to send to Plaintiff copies of any cases cited in their legal memoranda.

Finally, the Court appreciates the clarification provided by defense counsel regarding the proper name of one of the defendants. The Clerk of Court is directed to amend the caption as specified above. The Clerk of Court is also directed to mail a copy of this Order to Plaintiff at his address of record.

SO ORDERED.

Dated: January 17, 2025
New York, New York

A handwritten signature in blue ink, reading "Katherine Polk Faila".

KATHERINE POLK FAILLA
United States District Judge